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Return of Seized Property / Rule 41(e)

- **Rule 41(e) is not the proper vehicle for seeking the return of property seized for forfeiture when no forfeiture proceedings have been instituted. But the court may exercise equitable or "anomalous" jurisdiction to entertain such motions if the claimant is suffering irreparable harm and has no adequate remedy at law.**

- **When evaluating the merits of a motion for the return of seized property filed before forfeiture proceedings are instituted, the court should apply the four-part test of *United States v. $8,850* in order to determine if the delay has violated the claimant's constitutional rights.**

- **Where the delay in instituting civil forfeiture proceedings is due to the Government's desire to avoid jeopardizing an ongoing criminal investigation, a four-month delay is not unreasonable, but the Government must pursue its investigation with "reasonable dispatch."**

Acting pursuant to a seizure warrant, federal agents seized a number of vehicles comprising a significant portion of the inventory of Claimant's automobile business. Alleging that her business had been "effectively shut down" and that she, therefore, was suffering irreparable harm, Claimant filed a motion for the return of her seized property, pursuant to Rule 41(e).

As a threshold matter, the district court had to determine whether it had jurisdiction to entertain a Rule 41(e) motion in the absence of any pending criminal proceeding. The court held that it did not. Relying on Eighth Circuit precedents, the court held that a Rule 41(e) motion is only appropriate after there is a "suggestion of criminal proceedings."

The court then considered whether it could exercise equitable or "anomalous" jurisdiction over the seized property in order to grant Claimant some relief. Such jurisdiction, the court concluded, could be exercised depending on its evaluation of three factors: (1) whether there has been a "callous disregard of the Fourth Amendment"; (2) whether Claimant would suffer irreparable injury if relief were not granted; and (3) whether there is an adequate remedy at law.

Applying this test, the court readily found that the agents' reliance on a lawfully issued seizure warrant negated any suggestion of a "callous disregard" of Claimant's Fourth Amendment rights. The court found, however, that Claimant's affidavit detailing the impact of the Government's seizure on her business made an adequate showing of irreparable harm. The court also found that Claimant lacked an adequate remedy at law because no civil or criminal proceedings were pending, and because Claimant had no opportunity to recover any damages for injury to her property or business under the Federal Tort Claims Act, which exempts property seized for forfeiture from the waiver of the Government's sovereign immunity. Accordingly, the court held that it could exercise equitable jurisdiction.

The issue then was whether the court should release the seized vehicles to Claimant. Claimant submitted an affidavit denying that her property was involved in, or derived from, any criminal activity. In response, the Government submitted the sealed affidavit that it had used to obtain the seizure warrant for the court's *in camera* inspection. The court declined, however, to base its decision on whether the Government had or had not established probable cause for the seizure. Instead, the court applied the four-part test in *United States v. $8,850*, 461 U.S. 555 (1983), in order to determine if the Government's delay in instituting forfeiture proceedings had violated Claimant's due process rights.

Applying this test, the court concluded that Claimant's motion should be denied. Although Claimant had vigorously asserted her rights and had demonstrated prejudice from the seizure, only four months had elapsed from the seizure to the time the court ruled on the motion. Such a period of time, the court said, was "small when compared with the delays in other cases" that have applied *$8,850*. More importantly, the court held that it was able to determine from the documents submitted *in camera* that the Government had adequate reasons for the delay in instituting formal proceedings. "Where, as here, the [G]overnment is engaged in the diligent pursuit of a criminal investigation, there are strong reasons for permitting a delay in the institution of civil forfeiture proceedings," the court said. The court must allow the Government to conduct a criminal investigation "without jeopardizing its progress by forcing the [G]overnment to tip its hand."

However, the court concluded, at some point the Government's interest will be outweighed by Claimant's right to reclaim her property. Therefore, the court dismissed the motion without prejudice to Claimant's right to refile it "should the [G]overnment fail to proceed with reasonable dispatch in pursuing its case." —*SDC*

In the Matter of the Seizure of One White Jeep Cherokee, ___ F. Supp. ___, No. 4-97-M-20212, 1998 WL 25685 (S.D. Iowa Jan. 20, 1998).
Contact: AUSA Michael Hobart, AIAS01(mhobart).

Comment: This case is the latest in a series of recent cases to address an emerging issue in forfeiture law: How long can the Government hold on to property that has been lawfully seized for forfeiture without instituting formal forfeiture proceedings or without giving the claimant some other opportunity to challenge the validity of the seizure?

It is well-established that once the Government institutes forfeiture proceedings—administrative, civil judicial, or criminal—a claimant wishing to challenge the forfeiture has an adequate remedy at law. Thus, Rule 41(e) motions filed after forfeiture proceedings have been commenced are routinely denied. *See, e.g., United States v. One 1987 Jeep Wrangler*, 972 F.2d 472 (2d Cir. 1992); *United States v. U.S. Currency in the Amount of $146,800*, 1997 WL 269583 (E.D.N.Y. Apr. 28, 1997) (Rule 41(e) motion not appropriate vehicle for challenging legality of seizure where Claimant has adequate remedy at law—*i.e.*, contesting the forfeiture in the civil forfeiture case).

However, if the Government seizes property and *does not* institute forfeiture proceedings, the claimant is left with no remedy unless the court exercises equitable or "anomalous" jurisdiction.

In a number of recent cases, district courts have exercised such jurisdiction in order to give claimants some means of either contesting the Government's probable cause or forcing the Government to commence a formal forfeiture action sooner rather than later.

For example, some courts have held that the delay in instituting a forfeiture action gives the claimant a right to a probable cause hearing, at which the court will determine if the Government may continue to hold the claimant's property pending trial. *See In Re McCorkle*, 972 F. Supp. 1423 (M.D. Fla. 1997) (seizure of property without filing civil or criminal forfeiture action allows court to exercise anomalous jurisdiction to avoid manifest injustice that would result if the Government seized property without probable cause; motion denied upon finding that probable cause was established); *United States v. U.S. Currency in the Amount of $146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (the Government is generally not required to establish probable cause pretrial, but where the probable cause challenge is properly raised—*e.g.*, because of undue delay in filing the complaint—a finding of lack of probable cause may result in return of the property to the claimant pending trial); *In re Seizure of All Funds. . .Registry Publishing, Inc.*, 887 F. Supp. 435, 449 (E.D.N.Y. 1995) (the Government generally is not required to establish probable cause until trial, but where claimant files Rule 41(e) motion, and no forfeiture action is yet pending, the Government must demonstrate probable cause for the seizure at a hearing; motion granted because forfeiture was based on money laundering and there was no probable cause to support the underlying SUA offense).

Other courts have held that, notwithstanding the existence of probable cause, the Government must either commence a forfeiture action or return the property by a date certain in order to avoid violating the claimant's due process rights. *See In re: FBI Seizure of Cash and Other Property From Edwin W. Edwards*, 970 F. Supp. 557 (E.D. La. 1997) (where the claimant files a Rule 41(e) motion between the time of the seizure and the Government's filing of a forfeiture complaint, the motion will be stayed for 60 days to give the Government an opportunity to file).

The court in the instant case appears to have struck the proper balance, recognizing that the Government cannot hold on to a citizen's property forever without filing a forfeiture action, but recognizing also that the Government is entitled to some leeway in delaying the commencement of a forfeiture action while it is diligently pursuing a criminal investigation. The court also was apparently able to satisfy itself that the Government had probable cause for the seizure based on its *in camera* inspection of the relevant documents and, thus, did not give the claimant what she may actually have been seeking all along: a probable cause hearing in open court that would have been used to gain insight into the nature and status of the Government's ongoing investigation. —*SDC*

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Adoptive Forfeiture / Excessive Fines Clause

- **The Seventh Circuit evaluates excessive fines claims under both the "instrumentality" and "proportionality" standards. But, if the claimant fails to demonstrate disproportionality, the forfeiture is justified under the instrumentality standard alone.**

- **A federal agent's participation in a state criminal case that resulted in a plea agreement and the forfeiture of certain personal property does not bind the Government to the terms of the plea agreement and does not bar the Government from adopting the civil forfeiture of real property that was not forfeited in the state case.**

Claimants were caught growing 85 marijuana plants in the basement of their house and in possession of more than 100 grams of processed marijuana elsewhere in the house. They pleaded guilty to state charges of unlawful production of marijuana, and they agreed to pay restitution, fines, and costs in the amount of $6,298 and to forfeit to the state personal property seized during the search of their house. The Government thereafter commenced a civil forfeiture action against the claimants' real property under 21 U.S.C. § 881(a)(7). The Government filed a motion for summary judgment, and Claimants responded by asserting defenses under the Due Process Clause, the Excessive Fines Clause, and the Double Jeopardy Clause. The district court granted summary judgment for the Government, and the **Seventh Circuit** affirmed.

The claimants' double jeopardy argument was disposed of on the authority of *United States* v. *Ursery*, 518 U.S. 267 (1996).

The claimants argued that the forfeiture violated due process because the Government had participated in the state law enforcement investigation and "approved" the state plea agreement. The claimants further argued that the Government, by not instituting its own federal prosecution of the claimants under the "dual sovereignty" doctrine, had effectively "adopted" the state court prosecution as its own. Hence, said the claimants, the Government should be precluded by due process from imposing any additional sanctions not specifically contemplated in the state plea agreement.

The panel held, however, that the involvement of a DEA agent in the state criminal investigation was not sufficient to bind the United States to the state court prosecution and plea agreement. It noted that such an adoption requires the consent of either the Government or a state officer acting as the Government's agent. The panel found no evidence of such an "adoption" and further noted that the state plea agreement did not contain a promise that no penalties beyond those identified in the plea agreement would be sought.

The panel consisted of two members of the panel that decided *United States* v. *Plescia*, 48 F.3d 1452 (7th Cir.), *cert. denied*, 116 S. Ct. 114 (MEM) (1995), which heretofore was the leading case in the Seventh Circuit for resolving challenges to forfeitures under the Excessive Fines Clause. The panel rejected, however, the Government's reading of *Plescia* as adopting an "instrumentality" standard. It noted that, shortly after citing Justice Scalia's concurring opinion in *Austin* v. *United States*, 509 U.S. 602 (1993), the panel in *Plescia* had also compared the equity value of the defendant's home with the value of the drugs involved in the underlying offense. In light of the latter comparison, the panel held that *Plescia*'s "approving citation to Justice Scalia's concurring opinion. . .was at best an alternative holding, and more likely was merely dicta,

in the classic sense that it was unnecessary to the holding in the case."

The panel then opted to analyze forfeiture under both the "instrumentality" and "proportionality" standards, but it found it unnecessary to resolve the "mix" of factors that should be considered in such an analysis. It noted that the claimants had failed to introduce any evidence at trial to demonstrate disproportionality. It concluded, therefore, that the district court had properly granted summary judgment of forfeiture based solely on an instrumentality analysis. Alluding to assertions made by the parties during the appeal, the panel concluded that forfeiture of an equity of approximately $60,000 would not be disproportionate to either the value of the marijuana grown and possessed by the claimant or to the unenhanced Guidelines fine that claimants would have faced had they been convicted of federal drug crimes.

—HSH

United States v. One Parcel of Real Estate Located at 25 Sandra Court, ___ F.3d ___, No. 96-C-59, 1998 WL 35150 (7th Cir. Jan. 30, 1998). Contact: AUSA Carole Ryczek, AILN02(cryczek).

Comment: The panel notably did not include Judge Engles, who wrote the panel opinion in *Plescia*. The assertion that *Plescia* did not establish an "instrumentality" standard is somewhat surprising and contrary to the interpretation given that case by several district courts in the Seventh Circuit. *See United States v. Funds in the Amount of $170,926.00*, ___ F. Supp. ___, 1997 WL 735802 (N.D. Ill. Nov. 25, 1997) (the Seventh Circuit's test is a pure instrumentality test; as long as the forfeitable property falls within the statutory language and the connection to the offense is not "incidental or fortuitous," the property can be forfeited); *United States v. 5307 West 90th Street*, 955 F. Supp. 881 (N.D. Ill. 1996) (following *Plescia*, evidence of repeated use of residence for drug trafficking sufficient to overcome excessiveness challenge; rejecting consideration of proportionality and harshness factors, including effect of forfeiture on claimant's children).

The Supreme Court may soon shed light on the appropriate standard when it decides *United States v. Bajakajian*, No. 96-1487, ___ U.S. ___, 117 S. Ct. 1841 (1997) (petition for certiorari granted) (transcript of oral argument: 1997 WL 699804).

—HSH

Excessive Fines Clause

- **Applying the Seventh Circuit's new excessive fines analysis, district court holds that real property used in a marijuana grow operation is forfeitable as an instrumentality of the offense in the absence of any showing by the claimant that the forfeiture was disproportionate.**

- **Court also suggests that an Eighth Amendment claim is waived if not raised in response to the Government's motion for summary judgment.**

The Government filed a civil forfeiture action against real property used in a marijuana grow operation. When a parallel criminal prosecution was completed, the Government moved for summary judgment in the civil case. Claimant opposed the motion on a number of grounds, but did not raise any challenge under the Excessive Fines Clause. When the court granted the motion for summary judgment, however, Claimant filed a new motion for an evidentiary hearing on the Eighth Amendment issue.

The district court objected to this "two-stage approach." A party confronted with a potentially dispositive motion for summary judgment, the court said, "cannot hold something back, with the idea that if the motion is lost the party or its counsel can then reach back and pull an unused arrow from the legal quiver."

In any event, the court held that, even if it were to consider the excessive fines challenge as properly raised, it would reject it on the strength of the Seventh Circuit's recent decision in *United States v. One Parcel of Real Estate Located at 25 Sandra Court, supra.* Claimant in the instant case, like the claimant in *Sandra Court*, failed to make any showing that the forfeiture was disproportionate. Accordingly, the forfeiture was justified under the "instrumentality approach" standing alone. Property that is used for a marijuana grow operation, the court concluded, is "intimately linked"—or "one might say inextricably intertwined"—with illegal drug activity and, thus, is undeniably an instrumentality of the offense. —*SDC*

United States v. 47 West 644 Route 38, No. 92-C-7906, 1998 WL 59504 (N.D. Ill. Feb. 9, 1998) (unpublished). Contact: AUSA Ernest Yi Ling, AILN02(eling).

Ancillary Proceeding / Jury Trial / Section 853(a)

- **Fourth Circuit, in an unpublished decision, holds that third-party challenges to the constitutionality of the ancillary proceeding are foreclosed by the Supreme Court's decision in *Libretti.***

- **Because a criminal forfeiture is part of the punishment imposed on the defendant, the property rights of third parties are not implicated and no jury trial is required to protect them; a judicial hearing is all that is required to protect a third party's interest in making sure that her property is not forfeited.**

- **The district court's determination that the third party's testimony was incredible is a sufficient basis for rejecting a claim in the ancillary proceeding and will be afforded great deference on appeal.**

- **Defendant's vehicle is subject to forfeiture under section 853(a) as property traceable to drug proceeds, even though the indictment alleged that it was facilitating property. Because the statute supports both theories, it may be forfeited if the facts support either theory.**

Defendant was convicted on drug charges and ordered to forfeit various vehicles. In the ancillary proceeding, Defendant's girlfriend claimed that she was the true owner of a BMW that she purchased with $18,000 in cash. Noting that the girlfriend had limited personal income and that her claim was otherwise "less than credible," the court found that the girlfriend was a straw owner and denied her claim.

In her appeal, the girlfriend argued that the ancillary proceeding statute, 21 U.S.C. § 853(n), was

unconstitutional because it placed the burden of proof on the claimant and denied her a right to a jury trial. But the **Fourth Circuit** summarily rejected all of the claimant's constitutional arguments based on the Supreme Court's decision in *Libretti v. United States*, 516 U.S. 29 (1995). Under *Libretti*, the court held, criminal forfeiture is part of the *in personam* punishment imposed on the defendant. As such, it does not involve the property rights of third parties. The third party's interest in making sure that her property rights are not forfeited in the criminal case is adequately protected by the judicial hearing provisions in section 853(n).

The girlfriend also argued that the criminal forfeiture order was not supported by the evidence. The indictment listed the car as subject to forfeiture as facilitating property, but the evidence clearly showed that, if anything, the car was forfeitable only as drug proceeds. But the court of appeals was not impressed. Section 853(a) provides for criminal forfeiture of both drug proceeds and facilitating property. Therefore, it made no difference which prong was cited in the indictment. As long as the property was either used to facilitate a drug offense *or* was purchased with drug proceeds, the forfeiture was justified.

Finally, on the merits of the girlfriend's claim, the court of appeals held that she had failed to meet her burden of proving that her interests were superior to the Government's under section 853(n)(6)(A) and (B). The district court's finding that the girlfriend's testimony was incredible was a sufficient factual basis for rejecting the claim, and that factual determination is entitled to "great deference" on appeal. Accordingly, the order denying the third-party claim was affirmed.

—*SDC*

United States v. Holmes, 133 F.3d 918, 1998 WL 13538 (4th Cir. 1998) (Table). Contact: AUSA Marvin Caughman, ASC01(mcaughma).

Comment: This opinion addresses a matter of great importance in criminal forfeiture law; it is unfortunate that it is not published. Indeed, there are now a total of four judicial decisions rejecting constitutional challenges to the ancillary proceeding statute, all of which are unpublished. *See United States v. Messino*, 122 F.3d 427 (7th Cir. 1997) (collecting unpublished cases rejecting claim to a right to a jury trial in the ancillary proceeding, but declining to resolve the issue). But the court's analysis, brief as it is, is nevertheless instructive.

As the court holds, a criminal forfeiture is an inherently limited sanction that is imposed as part of the defendant's sentence in a criminal case. It is an *in personam* sanction that can only result in the forfeiture of the defendant's property. For that reason, a criminal forfeiture, unlike a civil forfeiture, cannot be used to forfeit any property rights of third parties. As long as the third party establishes herself as the true owner of the property in the ancillary proceeding, the third party's interest will be recognized and will not be forfeited.

That is the reason why a third party is not required to establish innocence in the ancillary proceeding. Because the property interests cannot be forfeited, her innocence is irrelevant. The third party will prevail as long as she has "superior ownership."

But, for the same reason, the claimant has no right to a jury trial in the ancillary proceeding and no reason to object to bearing the burden of proof. Ownership is the only issue in the ancillary proceeding, and nothing the claimant owns can be forfeited as long as she establishes that she is the true owner. In a proceeding in which the only issue is a determination of who is the true owner of the forfeited property, the claimant's rights are adequately protected by a simple hearing before a judicial officer at which she can establish the existence of her legal interest. It is in the nature of a "quiet title" action in which the claimant has brought an action against the Government to establish her interest. *See Messino, supra*, and unpublished cases cited therein.

For all of these reasons, the Fourth Circuit's rejection of the defendant's girlfriend's

constitutional challenges to the ancillary proceeding is correct. For the same reasons, however, the court should simply have rejected the claimant's challenge to the forfeitability of the property instead of addressing the issue on the merits. If, as the court held, the forfeiture implicates only the defendant's rights and requires the third party to do nothing more than establish superior ownership, there is no reason why the claimant should have been allowed to contend that the forfeiture of the car on "proceeds" theory was at variance with the indictment which alleged that the car was forfeitable as facilitating property. If the claimant was the true owner of the car, she would have prevailed in the ancillary proceeding, regardless of whether the theory of forfeiture on which the district court relied was supported by the evidence or consistent with the theory set forth in the indictment. Accordingly, the forfeitability of the property is of no concern to a third party and should not have been addressed on the merits. —*SDC*

Probable Cause / Proceeds / Money Laundering

- **Forfeiture of real property under a "proceeds" theory requires probable cause to believe that *all* of the money used to purchase the property was drug proceeds; any portion traceable to legitimate assets would not be subject to forfeiture.**

- **Because a money laundering conviction only requires a jury to find that a financial transaction "involved" drug proceeds, it may not be used to establish probable cause for forfeiture of real property in its entirety under section 881(a)(6).**

Defendant was convicted of money laundering when he used funds from a Swiss bank account containing drug proceeds to buy real property. The money laundering conviction was upheld on appeal. *See United States v. Garcia*, 37 F.3d 1359 (9th Cir. 1994). Subsequently, the Government sought civil forfeiture of the real property under 21 U.S.C. 881(a)(6), alleging that the property was traceable to drug proceeds. The district court granted summary judgment for the Government, and Defendant appealed. The **Ninth Circuit** reversed.

First, the court held that the district court erred in relying on the money laundering conviction to establish probable cause to support the forfeiture of the property as drug proceeds. For money laundering purposes, a financial transaction need only "involve" proceeds of a specified unlawful activity. Thus, the jury in the money laundering case was required to find that Defendant conducted a financial transaction involving the Swiss bank account and that at least some of the commingled funds in that account represented drug proceeds. It did not have to find that *all* of the money in the account was drug proceeds. *See Garcia, supra.*

To forfeit real property, in its entirety, under section 881(a)(6), however, the Government must establish that all of the money used to buy the property was drug proceeds. If a portion of the property was purchased with legitimate funds, there would be no probable cause to support the forfeiture of that portion of the property. As the Ninth Circuit has previously observed, "[a]ny interest in property purchased with illegitimate assets is forfeitable, but any interest purchased with legitimate assets, even legitimate assets of a drug dealer or someone who knows they are doing business with a drug dealer, is not forfeitable under 21 U.S.C. § 881(a)(6) because it is not 'proceeds traceable to' a drug transaction." *See United States v. Real Property Located at 20832 Big Rock Dr.*, 51 F.3d 1402, 1411 (9th Cir.

1995). Because the jury in the money laundering case could have found that the real property was purchased with commingled funds, Defendant was free to argue that at least a portion of the real property was traceable to legitimate assets.

The court then proceeded to determine whether the Government had established probable cause for the forfeiture of the property in its entirety without relying on the money laundering conviction. It held that the Government had not. At best, the Government's evidence showed that Defendant had used a "large sum of money" to purchase the real property in suspicious circumstances. As the Ninth Circuit has repeatedly held in recent cases, a claimant's possession of large sums of money "may support a suspicion of illegal activity, but a mere suspicion of illegal activity is not enough to establish probable cause that the money was connected to drugs." *See United States v. $30,060*, 39 F.3d 1039, 1041 (9th Cir. 1994) (claimant could "just as easily have been a distributor of 'street money' in a political campaign, an embezzler, a jewel smuggler, an art thief, or an S & L crook as a drug conspirator"). The court conceded that Defendant's conviction on drug conspiracy charges would normally be part of the probable cause equation, but the conviction was not obtained until after the civil forfeiture action was commenced and, thus, under Ninth Circuit law could not be considered in evaluating the Government's probable cause. *See United States v. $191,910 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994) (the Government must have probable cause at the time it files its complaint).

Accordingly, the order granting summary judgment for the Government was reversed and remanded to give the Government an opportunity to establish probable cause, based on whatever evidence it may have had in its possession at the time the complaint was filed. —*SDC*

United States v. Real Property Located at 22 Santa Barbara Drive, 121 F.3d 719, 1997 WL 420580 (9th Cir. 1997) (Table). Contact: AUSA John Lee, ACAC15(jlee).

Comment: The easiest way to forfeit property involved in a money laundering offense is to do it under the money laundering forfeiture statutes: 18 U.S.C. §§ 981-982. In this case, it probably would have been best to have included a criminal forfeiture count under section 982 in the indictment. However, if it was necessary to address the interests of a non-innocent co-owner, the Government could have done a separate civil forfeiture under section 981(a)(1)(A). Money laundering forfeitures are broader than "proceeds" forfeitures under section 881(a)(6) because, in money laundering cases, all property "involved in" the offense is subject to forfeiture, not just the portion traceable to the proceeds of "specified unlawful activity." In other words, because the money laundering offense was the purchase of the real property, and because the property was undeniably "involved in" that offense, the property would have been subject to forfeiture in its entirety under section 981(a)(1)(A), even though only a portion of the money in the defendant's Swiss bank account that was used to buy the property was drug proceeds. But, because the Government filed the civil forfeiture action under the "proceeds" theory in section 881(a)(6), it was limited to forfeiting the portion of the property traceable to drug proceeds and could not forfeit the property in its entirety unless it established probable cause to believe that all of the money involved in the transaction was drug proceeds. —*SDC*

Money Laundering / Sting Operation

■ **Third parties who received laundered funds from an undercover account established at a bank sue the bank for failing to warn them that the funds were the proceeds of criminal activity and subject to forfeiture. Court denies the bank's motion to dismiss.**

In an undercover operation, Customs agents posed as money launderers and deposited drug proceeds into an undercover account set up by the U.S. Customs Service at a local U.S. bank. The agents then wire-transferred funds from the undercover account to accounts at other banks. These recipient accounts became the subject of a civil forfeiture proceeding, pursuant to 18 U.S.C. § 981.

The owners of the recipient accounts used the civil forfeiture action to file a third-party claim *against the bank* where the undercover account was located, alleging that the bank had breached two duties. First, at the time of the wire transfer, the bank allegedly owed the recipient account owners a duty of good faith to inform them that the funds transferred represented criminal proceeds and, thus, were subject to forfeiture. Second, the bank allegedly owed the recipient account owners a duty of due diligence to determine the source of the funds and, further, upon discovering this source, a duty of due care and good faith *not* to wire-transfer the tainted funds.

The bank filed a motion to dismiss the third-party demand, pursuant to Fed. R. Civ. P. 12(b)(6). The bank argued that, as matter of law, it owed no duty to disclose any information about its "customer"—*i.e.*, the undercover agents—and had no duty to determine whether funds wire-transferred from the undercover account were the proceeds of a criminal offense. Further, the bank maintained that it owed no duty of due care or good faith to the recipient account owners, no duty to notify them of the source of the funds, and no duty to notify them about the investigation.

Nonetheless, after reviewing the allegations in three paragraphs of the third-party demand, the district court concluded that the third-party demand set forth a cause of action upon which relief could be granted. The denial of the bank's motion to dismiss contained no legal analysis. The court did not state whether only one or both of the theories of recovery presented by the recipient account owners were viable. The court reached its conclusion solely based upon "the record, the law, memoranda submitted by the parties, and after construing the third[-]party complaint liberally in favor of the claimants." —*AJK*

United States v. All Funds on Deposit,
No. CIV-A-97-0794, 1998 WL 32762 (E.D. La. Jan. 28, 1998) (unpublished). Contact: AUSA Larry Benson, ALAE01(lbenson).

Stay Pending Appeal / Certificate of Reasonable Cause

■ **Order dismissing forfeiture action against currency seized at airport for lack of probable cause stayed pending appeal to preserve Government's ability to recover if the order is reversed. But the court declines to issue certificate of reasonable cause.**

In two unrelated cases, the district court found that the Government lacked probable cause to forfeit currency seized at an airport from suspected drug couriers and granted claimants' motions to dismiss pursuant to Rule 12(b)(6). See *Quick Release*, [January 1998]: 8-10. The Government sought to appeal the two decisions and, while awaiting Department of Justice authorization, asked the court to stay its judgments dismissing the complaints and to issue certificates of reasonable cause. The court granted the stays, but declined to issue the certificates of reasonable cause.

In identical opinions, the court observed that the plain language of the statute authorizing a stay, 28 U.S.C. § 1355(c), seemed to make the stay mandatory. *See* section 1355(c) (the court "shall issue any order necessary to preserve the right of the party to the full value of the property"). Nevertheless, because several appellant courts have held to the contrary, the court applied the usual standards for determining whether to grant a stay pending appeal—*i.e.*, (1) whether, absent a stay, the moving party may suffer irreparable harm; (2) the substantiality of harm to the opposing party if a stay is granted; (3) whether the movant has demonstrated a substantial possibility of success on appeal; and (4) any public interest that might be affected—and found that stays were appropriate in both cases. Most important, the court recognized that both cases involved seized currency that was unlikely to remain available for forfeiture to the Government if returned to the claimants. Failure to enter the stay in that situation would reduce the Government's appeal to an empty exercise.

As to the certificate of reasonable cause, the court simply noted that "reasonable cause" and "probable cause" were synonymous phrases and that, because it had already found that the Government had no probable cause for the seizure, the request for certificates would be declined. —*JRP*

United States v. $14,876.00, No. CIV-A-97-1967, 1998 WL 37522 (E.D. La. Jan. 29, 1998) (unpublished). Contact: AUSA Larry Benson, ALAE01(lbenson).

United States v. $13,570.00, No. CIV-A-97-1997, 1998 WL 37519 (E.D. La. Jan. 29, 1998) (unpublished). Contact: AUSA Larry Benson, ALAE01(lbenson).

Stay Pending Appeal

■ **District court refuses to grant stay of its order granting claimant's motion for summary judgment and denying Government's motion for forfeiture of real estate, concluding that the "shall" language of the statute providing for a stay pending appeal, 28 U.S.C. § 1355(c), does not mandate a stay.**

The Government sought forfeiture of a parcel of real estate in Saddle River, New Jersey, and the owner filed claim alleging innocent ownership. The district court granted claimant's summary judgment motion and denied the Government's motion for forfeiture, finding that the claimant was an "innocent owner." *See Quick Release* [January 1998]: 16-18. Pursuant to 28 U.S.C. § 1355(c), the Government requested a stay of the court's order, pending the outcome of the Government's appeal to the Third Circuit.

Section 1355(c) of Title 28 provides that "upon motion of the appealing party, the district court *shall* issue any order necessary to preserve the right of the party to the full value of the property at issue, including a stay of the judgment..." (emphasis added). The Government argued that the word "shall" means that a district court *must* enter a stay upon the request of the appealing party. The district court, however, stated that the Third Circuit had not yet addressed whether "shall" meant "must" and that two other Courts of Appeal had already concluded that a stay was not mandatory in such cases. Instead, those circuits concluded that section 1355(c) requires an appellant to meet the standard test of whether a stay should be granted pending appeal; namely, (1) whether the applicant has made a strong showing that he is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injury the other parties interested in the proceeding, and (4) where the public interest lies.

Applying this test, the court held that, though the Government will be substantially harmed because the owner likely will have disposed of the property by the time the Third Circuit renders its opinion, it nonetheless would deny the application for the stay. The court reasoned that the other factors weighed in favor of the claimant. In particular, the court held that the Government had not demonstrated that the district court made any error in granting the motion for summary judgment based on the application of the innocent owner statute. Thus, the Government had not made the requisite showing of likelihood of success on appeal. —*JRP*

United States v. 1993 Bentley Coupe,
No. CIV-A-93-1282, 1997 WL 803914 (D.N.J. Dec. 30, 1997) (unpublished). Contact: AUSA Peter G. O'Malley, ANJ01(pomalley).

Comment: Section 1355(c) of Title 28 provides that a stay pending appeal is mandatory upon the request of the appealing party. The provision was enacted, in part, to protect the Government's interest in property ordered released to the claimant pending appeal. The legislative history of the provision reads as follows:

> "[T]he appellate court is obliged to take whatever steps it deems necessary, including ordering the stay of the district court order. . . , to ensure that while the appeal is pending, the party exercising control over the property does not take any action that would deprive the appellant of the full value of the property should the district court's judgment be reversed. The types of actions that he appellate court must seek to protect against are those listed in 21 U.S.C. § 853(p)."

137 Cong. Rec. S12238 (daily ed. Aug. 2, 1991).

In light of this legislative history, it seems that the Government should be able to make a compelling argument that "shall" means "must" in section 1355(c). —*SDC*

Notice

- **Property owner who fails to file claim and answer in civil forfeiture proceeding after reasonable notice lacks standing to set aside default judgment entered by magistrate judge.**

- **Ninth Circuit joins other courts in holding that notice sent to a prisoner at his place of incarceration is adequate to satisfy due process, even if there is no proof that the prisoner actually received the notice.**

The Government filed a complaint for civil forfeiture under 21 U.S.C. § 881(a)(7) against a motel after its owner was indicted on narcotics charges. The summons and complaint were sent by certified mail to the owner in the county jail where he was a pretrial detainee. Copies of the summons and complaint were sent also to the motel owner's criminal defense attorney, who visited the owner in prison and informed him that he would be representing the owner's sister and brother-in-law in the forfeiture action. According to the attorney, the owner advised him that he did not want to contest the forfeiture.

The attorney filed a claim and answer on behalf of the sister and brother-in-law; the owner did not respond in the forfeiture action. The Government subsequently moved for a partial default concerning the owner's interest in the motel. The Government and the attorney representing the sister and brother-in-law then consented to the jurisdiction of a magistrate judge, who then entered a partial default judgment as to the owner's interest. The sister and brother-in-law ultimately withdrew their claims, and the Government obtained a final judgment of forfeiture. Six months after the final judgment of forfeiture, the owner moved *pro se* to set aside the default, arguing that his due process rights had been violated. The magistrate judge denied the motion and the owner appealed.

On appeal before the **Ninth Circuit**, the owner conceded that the Government had sent copies of the summons and complaint for forfeiture to the jail in which he was incarcerated, but claimed that he never actually had received notice and that the Government's failure to provide actual notice violated due process. The panel ruled that due process required only that the Government employ such notice "as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). The panel found that the Government's efforts to notify the owner had been reasonable and satisfied due process because, in addition to the publication of notice in a local newspaper and delivery of copies of the summons and complaint to the owner's criminal defense attorney, the Government's certified mailing to the owner in jail had been signed for by an officer at the jail, where, according to jail officials, such mail was routinely opened in the presence of the inmate, inspected for contraband, and distributed directly to the inmate. The court also concluded that due process does not require actual notice of the forfeiture proceedings to interested parties. *See 51 Pieces of Real Property Roswell, N.M.*, 17 F.3d 1306, 1316 (10th Cir. 1994); *United States v. One Urban Lot etc.*, 885 F.2d 994, 999 (1st Cir. 1989).

The owner also urged the **Ninth Circuit** to hold that the record owner of a property must consent in order for a magistrate judge to establish jurisdiction over a civil forfeiture action concerning the property at issue, even if the property owner has failed to respond to the forfeiture complaint. The court acknowledged that 28 U.S.C. § 636(c)(1) allows a magistrate judge to establish jurisdiction over an action only if the parties consent. However, the court ruled that the owner's failure to comply with the applicable filing requirements in civil forfeiture actions

precluded his standing as a "party" to the action and made it unnecessary to obtain his consent to the magistrate judge's jurisdiction. *See United States v. 8136 S. Dobson Street*, 125 F.3d 1076, 1082 (7th Cir. 1997) (absent filing a claim to property subject to forfeiture, putative claimant is not a party to the action). The court stated that "[s]o long as the [G]overnment takes the steps mandated by due process to notify the record owner of an impending forfeiture, it is the owners's responsibility to comply with the procedural requirements for opposing the forfeiture."

The owner further argued that his motion to set aside the default judgment made him a party to the litigation at that point and that his consent was required for the magistrate judge's jurisdiction over that motion. The **Ninth Circuit** panel pointed out that the owners's motion had been brought pursuant to Fed. R. Civ. P. 60, which authorizes any "party" to seek relief, and ruled that, because the owner had not been a "party" to the original action, he lacked standing to bring the motion and consequently also lacked standing to challenge the magistrate judge's jurisdiction to hear the motion. —*JHP*

United States v. The Lido Motel, 5145 North Golden State, ___ F.3d ___, No. 96-15720, 1998 WL 47135 (9th Cir. Feb. 9, 1998). Contact: AUSA Clare Nuechterlein, ACAE01 (clnuecht).

Notice

- **Failure to continue efforts to provide notice of administrative forfeiture when notice letter was returned from potential claimant's known place of incarceration before administrative forfeiture became final renders notice inadequate.**

After seizing $1,813.10 from the defendant at the time of his arrest for drug offenses, the Drug Enforcement Administration (DEA) published notice of its administrative forfeiture proceeding in *USA Today* and sent notices by certified mail to the two addresses it had for the defendant: his previous home address and his address at the local jail where he was being held pending trial. The notice sent to the home address was signed for by an unidentified person who apparently failed to forward it to the defendant. The notice sent to the jail was signed for by an unidentified person, but was then returned to DEA stamped "return to sender." DEA received the returned notice letter, but made no further attempts to contact the defendant and administratively forfeited the seized money.

After his conviction for the drug offenses, the defendant moved for return of the seized money. The United States asserted that the administrative forfeiture after adequate efforts to notify the defendant of the forfeiture had conclusively terminated the defendant's claim to the money. The district court agreed and granted summary judgment for the United States. On appeal, the defendant challenged the district court's conclusion that the Government's efforts to notify him of the forfeiture had been adequate to satisfy due process.

The **D.C. Circuit** ruled that the means of providing notice that had been employed by the Government were not reasonably designed to inform the defendant of the pending action and, therefore, did not satisfy due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The panel found that "newspaper notices have virtually no chance of alerting an unwary person that he must act now or forever lose his rights; they are no

more effective than publishing a notice in the Federal Register." The court pointed out that notice by publication is adequate only in certain circumstances not applicable in this case. *See id.* at 317 ("in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits"). The panel ruled that the notice mailed to the defendant's home address was inadequate because the Government knew, or easily could have ascertained, that the defendant was incarcerated at the local jail. In addition, the panel ruled that the notice mailed to, received by, and subsequently returned from the jail was inadequate.

The panel ruled that, under the circumstances, the Government reasonably was required to resend notice to the jail, where it knew the defendant was incarcerated once it learned that notice had not been delivered on the first attempt. The court conceded that, at some point, a forfeiture becomes final and that, if the Government has made constitutionally adequate efforts to give notice before that time, the Government need not reopen the matter because of information acquired afterwards. However, the panel ruled that, because the Government's records failed to indicate the time when the notice had been returned to DEA from the jail, the Government should bear the burden of this gap in the record.

The court also conceded that when the Government learns that a notice letter has not been delivered, it may in some cases be able to assert that it has done its best and must treat the potential claimant as a missing person. *See Mullane*, 336 U.S. at 317. Nevertheless, the court found that when the Government has some additional piece of information that reasonably can be used to locate the potential claimant such as knowledge that the potential claimant is in prison, it is obliged under *Mullane* to try again, unless it would be unreasonably burdensome to do so. *See Armendariz-Mata v. United States Dept. of Justice*, 82 F.3d 679, 683 (5th Cir. 1996) (finding that the Government must try to give notice again when a notice sent to a jail is returned undelivered); *Torres v. $36,256.80 U.S. Currency*, 25 F.2d 1154, 1161 (2d Cir. 1994) (after notice returned from prison undelivered, the Government obliged to call the Bureau of Prisons and inquire concerning inmate's whereabouts).

Given the Government's failure to continue with reasonable efforts to deliver notice to the defendant in jail after the initial failure, the **D.C. Circuit** reversed the district court's order of summary judgment and ordered the district court on remand to grant the defendant a hearing on the merits of the forfeiture.

—JHP

Small v. United States, ___F.3d ___, No. 97-5008, 1998 WL 66733 (D.C. Cir. Feb. 20, 1998). Contact: AUSA William Cowden, (202) 514-7736.

Notice

■ **Failure to send notice of administrative forfeiture to criminal defense counsel or Assistant United States Attorney handling related indictment when notice mailed to defendant's last known address has been returned unclaimed renders notice inadequate.**

Drug Enforcement Administration (DEA) agents seized $21,905 from the defendant at the time of his arrest in connection with an alleged drug conspiracy. The defendant was indicted and released on bail. DEA subsequently sent the defendant notice by certified mail of its intent to administratively forfeit the seized currency. The notice was sent to the address given by the defendant at the time of his arrest. The notice was returned stamped as unclaimed. DEA also published notice. After no response was received from the defendant, DEA administratively forfeited the seized cash. Two years later, the defendant claimed in district court that the administrative forfeiture was void because DEA had violated due process by failing to provide him adequate notice of the forfeiture proceeding.

The district court acknowledged that, ordinarily, it would lack jurisdiction over administratively forfeited property, *see Onwubiko v. United States*, 969 F.2d 1392, 1398 (2d Cir. 1992), but pointed out that it has jurisdiction to correct procedurally deficient administrative forfeitures. *Id.*; *see also Boero v. Drug Enforcement Administration*, 111 F.3d 301, 305 (2d Cir. 1997).

The court pointed out that, in order to satisfy due process, notice must be "'reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1161 (2d Cir. 1994) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The court also pointed out that the standard does not require actual notice, but requires that the Government act reasonably in choosing and implementing a means likely to inform the party of the proceeding. *See Hong v. United States*, 920 F. Supp. 311, 316 (E.D.N.Y. 1996). The court noted that the defendant had not been personally notified of the forfeiture proceeding and that at the time notice was sent and returned unclaimed, the defendant was under indictment, out on bail, and represented by counsel, but that neither the defendant's counsel nor the Assistant United States Attorney assigned to the criminal case were notified by DEA about the forfeiture proceeding. The court found that, under these circumstances, the notice was not reasonably calculated to apprise the defendant of the forfeiture proceeding and, thus, did not satisfy due process. The court ruled that the administrative forfeiture of the seized currency was void, but allowed DEA 30 days to initiate a new forfeiture proceeding.

—JHP

United States v. Gambina, No. 94-CR-1074(SJ), 1998 WL 19975 (E.D.N.Y. Jan. 16, 1998) (unpublished). Contact: AUSA Demetri Jones, ANYEG01(djones).

Summary Judgment / Due Process / Adoptive Forfeiture

- **19 U.S.C. §§ 1607-09 do not preclude a plaintiff from filing a *Bivens* or a 42 U.S.C. § 1983 action.**

- **Failure to challenge an administrative forfeiture precludes plaintiff from asserting Fourth Amendment challenges to the forfeiture in a judicial proceeding.**

- **Federal adoption of a forfeiture is valid in the Eighth Circuit even when the person who originally seized the property had no authority to do so, or when the initial seizure was constitutionally tainted.**

- **Any constitutional infirmity in the transfer of seized property, or lack of authority to transfer the property, will not taint the subsequent federal adoption.**

- **State statutory forfeiture restrictions are inapplicable to federal administrative proceedings.**

Officers of a local Missouri police department searched Plaintiff's home, pursuant to a warrant issued by a circuit judge and based upon statements made by a confidential informant that marijuana packaged for sale was present in the residence. During the search, numerous weapons and freezer and plastic baggies containing marijuana, drug paraphernalia, and $3,543 in cash were located and seized. Shortly thereafter, a county prosecutor filed a complaint charging the plaintiff with possession of a controlled substance and the currency was adopted for federal administrative forfeiture by the Drug Enforcement Administration (DEA).

Subsequently, DEA sent written notice of the seizure to the plaintiff by certified mail. Notice was unclaimed and eventually returned to DEA. Several other individuals connected with the plaintiff were personally noticed by certified mail and agents of these addressees accepted delivery. DEA also published notice of the seizure in *USA Today* for three consecutive weeks. The administrative proceedings remained unchallenged and upon expiration of the notification period, a declaration was issued.

In a separate action, however, the plaintiff, by then, a Missouri prisoner, filed a lawsuit in federal court asserting that his constitutional rights were violated in connection with a search of his residence, his arrest, seizure of the currency, and the transfer of the currency to DEA. Competing pretrial summary judgment motions were filed by the plaintiff and the defendants (local law enforcement officers and DEA).

As a threshold matter in considering the motions, the court decided that forfeiture remedies provided in 19 U.S.C. §§ 1607-09 do not preclude actions brought under *Bivens* or under 42 U.S.C. § 1983. Thus, the court maintained that the plaintiff's claims would be addressed as if brought in a *Bivens* or section 1983 action, even though the court could not address the plaintiff's constitutional challenges to the forfeiture of the currency in a forfeiture case, once the plaintiff failed to exercise his right to challenge the forfeiture during the administrative proceedings.

With regard to the plaintiff's assertion that the state defendants wrongfully seized the currency in violation of Missouri law, thereby creating a jurisdictional defect and precluding the Government from properly

receiving the asset, the court relied on *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995), which held that the United States may adopt the seizure of property seized by another agency as related to illegal drug use or trafficking, even when the person who originally seized the property had no authority to do so, or when the initial seizure was constitutionally tainted. Furthermore, any constitutional infirmity in the transfer of seized property, or lack of authority to transfer the property, does not taint a federal adoption. This holding, coupled with the fact that the Missouri statute is inapplicable to a federal forfeiture proceeding, precluded consideration of the plaintiff's assertion that DEA's adoption was improper because DEA did not follow Missouri statutory notice requirements.

The plaintiff further argued that DEA failed to provide notice prior to accepting transfer of the seized currency and failed to provide adequate notice after seizure, in violation of his due process rights. The court found these arguments unavailing. Noting that due process does not require any pre-adoption notification, the court further found that DEA's attempt to notify the plaintiff of the administrative proceeding, via a certified mailing to a correct address during a time when the plaintiff was not incarcerated, was sufficient to meet due process requirements. Holding that the plaintiff failed to establish any genuine issues of material fact concerning violation of his due process rights by DEA, the court granted the Government's motion for summary judgment. —*WJS*

Ivester v. Lee, ___ F. Supp. ___, No. 4:96-CV-1807, 1998 WL 34865 (E.D. Mo. Jan. 26, 1998). Contact: AUSA Raymond M. Meyer, AMOE01(rmeyer).

Probable Cause / Section 888

- **District court in Florida holds that the expedited procedures set forth in 21 U.S.C. § 888(c) do not apply to conveyances seized under 21 U.S.C. § 881(a)(6).**

- **In order to show probable cause that a conveyance was purchased with drug proceeds, the Government must show a more-than-incidental nexus between the property seized and the drug-related offense. In order to establish the requisite nexus, the Government must allege facts about the nature of the funds used to purchase the conveyance.**

The defendant aircraft was seized in December 1996 as a conveyance that (1) facilitated the distribution of drugs, (2) was purchased with drug proceeds, and (3) displayed a false registration mark. Claimant filed a claim and cost bond in May 1997, and the Government filed a complaint on August 6, 1997. Claimant moved to dismiss, based on 21 U.S.C. § 888 and the lack of probable cause.

The court first decided that the Government's claim for forfeiture, pursuant to 21 U.S.C. § 881(a)(4), was time-barred, for the complaint was not filed within 60 days of the posting of a bond in compliance with 21 U.S.C. § 888(c). Both parties agreed that the expedited procedures in section 888(c) apply to facilitating property.

The court next considered whether the expedited procedures of section 888(c) apply to conveyances seized as proceeds, pursuant to 21 U.S.C.

§ 881(a)(6), an issue of first impression in the Eleventh Circuit. The statute, silent as to which particular parts of section 881 are governed by the expedited procedures, designates an accelerated decision process only with respect to conveyances seized for "a drug related offense." Noting the term's ambiguity, the court sought to ascertain congressional intent. The definition of a drug-related offense is found in 21 C.F.R. § 1316.91(d) and specifically references manufacturing and distribution, but not money laundering offenses. Departing from the Seventh Circuit's approach, the court reasoned that vehicles seized as proceeds under section 881(a)(6) will generally require the dedication of more time to an investigation because laundered funds must be traced in order to establish probable cause in a complaint for forfeiture and, thus, they are exempt from the expedited procedures required by section 888(c).

Finding that the Government's claim under section 881(a)(6) was not time-barred, the court considered the claimant's contention that the Government failed to allege facts sufficient to sustain the forfeiture. Although section 881(a)(6) does not require the Government to trace purchase money to any particular drug transaction in order to establish probable cause, the court considered the aggregation of allegations offered by the Government to determine whether more than an incidental or fortuitous nexus had been established between the property seized and the drug-related offense. The court found that the Government failed to allege any facts establishing that the funds used to purchase the airplane were illicit. In fact, the Government failed to allege *any* facts about the funds used to purchase the aircraft or the nature of the purchaser's earning capacity and financial status. Most of the Government's evidence related to the use of the aircraft by drug traffickers, not to the way in which it was purchased.

Claimant's final challenge to the complaint asserted that the Government failed to state a claim for violation of 49 U.S.C. § 46306, which applies only to aircraft not used to provide air transportation. In order to survive dismissal, the Government should have, but did not, allege that the defendant aircraft was not involved in air transportation.

Although the Government's complaint was dismissed, the court provided leave to file an amended complaint so that the Government could support a proceeds claim for forfeiture by including factual allegations regarding the nature of the funds used to purchase the aircraft. —*WJS*

United States v. One 1980 Cessna 441 Conquest II Aircraft, ___ F. Supp. ___, No. CIV-97-2539, 1997 WL 817203 (S.D. Fla. Dec. 16, 1997). Contact: AUSA Scott Ray, AFLS03(sray).

Comment: The case law on this issue is mixed. *See United States v. A 1966 Ford Mustang*, 945 F. Supp. 149 (S.D. Ohio 1996) (section 888 does not apply to vehicle forfeited as drug proceeds under section 881(a)(6)); *but see United States v. One 1996 Toyota Camry*, 963 F. Supp. 903 (C.D. Cal. 1997) (section 888 applies to forfeiture of car as proceeds under section 881(a)(6); collecting cases; remedy for section 888 is return of property to claimant upon payment of bond). —*SDC*

Criminal Forfeiture / Restraining Order / Removal of State Court Action

- **District court enjoins Defendant from pursuing state court action involving property subject to federal forfeiture order, and removes the state case to federal court, to prevent Defendant from litigating his right to the forfeited property in another forum.**

- **Court also finds defendant in contempt for failure to turn over money traceable to assets he dissipated from business subject to forfeiture; Defendant cannot assert right against self-incrimination to avoid turnover.**

The RICO prosecution of organized crime figures resulted in their convictions and the entry of a $22 million personal money judgment against them. After attempts to collect the money were largely unsuccessful, the district court appointed a receiver for various waste carting companies owned by the defendants and directed that the companies be sold. The receiver had particular difficulty in selling one company, Rosedale, finally having to sell it at a substantial discount. The reduction in Rosedale's value was due to various machinations of the defendants, particularly the activity of Dominic Vulpis, who diverted Rosedale's business to a company in which he had a significant minority interest. Also, Vulpis sued that company for breach of contract, which the receiver determined was just a means for Vulpis to collect some of the money owed to him for diverting Rosedale's business to the company.

The district court was evidently concerned that Vulpis was using the state court breach of contract action to acquire a property interest in assets that were derived from Rosedale and, thus, were subject to the federal forfeiture order. Accordingly, the court issued a restraining order prohibiting Vulpis from prosecuting or settling the state court action and removed the state case to federal court under the All Writs Act. Furthermore, the court ordered Vulpis and his confederates to deposit the funds they had received for diverting business from Rosedale into an escrow account and directed him to give certain information to the court and to appear for a hearing. When Vulpis failed to comply, he was found in contempt.

At his contempt hearing, Vulpis argued that payment of the funds into the escrow account and requiring him to instruct his confederates to do likewise, would violate his Fifth Amendment nontestimonial privilege by requiring him to admit that he had received the funds and that they came from particular sources. The district court agreed that under certain circumstances, the requirement that a person produce documents or money sought by the Government has a testimonial aspect and is tantamount to self-incrimination. However, it held that the burden of proof is on the contemnor to show that the required acts might tend to incriminate him. It found that, in this case, the Government already knew of the payments, the payors, and the payees and concluded that, "there is no Fifth Amendment violation if the sought information adds a minor or negligible amount to the [G]overnment's intelligence."

Based upon Vulpis' contumacious behavior, the court converted its restraining order into a preliminary injunction and added a paragraph requiring Vulpis to turn over a minimum of $2,184,983, a sum which could be directly traced as part of the illicit payments received by him. —*BB*

United States v. Paccione, ___ F. Supp. ___, No. 89-CR-446, 1998 WL 25735 (S.D.N.Y. Jan. 21, 1998). Contact: AUSA Sharon Levin, ANYS11(slevin).

Double Jeopardy / Rule 48(a)

■ **Indicting same property in two different criminal cases against the same defendant does not violate the Double Jeopardy Clause, nor does it violate Rule 48(a) to dismiss a forfeiture count from an indictment without the defendant's consent once the trial has commenced.**

In the defendant's first criminal trial, he was charged with 17 substantive counts and one criminal forfeiture count. Prior to the trial, the forfeiture count was bifurcated from the other charges. The defendant was convicted of mail fraud, wire fraud, and money laundering. Then, before the forfeiture proceedings began and without the defendant's consent, the United States filed a motion to dismiss the forfeiture count, which the court granted. In the defendant's second criminal trial, the instant case, the defendant was charged with 23 substantive counts and one criminal forfeiture count, which was identical to the one asserted in the prior trial. As a result, the defendant moved to dismiss the forfeiture count on the grounds that, under Fed. R. Crim. P. 48(a), the Government did not obtain the defendant's consent to dismiss the forfeiture count in the first indictment and that permitting trial on the forfeiture issue in the instant case would violate the Double Jeopardy Clause.

The district court denied the defendant's motion. The court noted that Rule 48(a), which bars the dismissal of an indictment once the trial has started without the defendant's consent, is intended to protect the Government, since dismissal without the defendant's consent would invoke double jeopardy protection, barring further proceedings against the defendant on the same charge. However, the court added that Rule 48 would not apply to the dismissal of a forfeiture count, even if it were determined that the dismissal of the forfeiture in the first case occurred "during trial." The court offered three reasons for its conclusion. First, a criminal forfeiture is an element of the sentence, not a substantive offense. Second, since the forfeiture claim in the defendant's first case was dismissed prior to resolution, the forfeiture in the subsequent case could not be considered a second punishment. Third, the defendant did not demonstrate the instant forfeiture count arose from the same criminal offense as the prior forfeiture count. Thus, there was no Rule 48 violation, nor was there any violation of the Double Jeopardy Clause. —*HSL*

United States v. Ruedlinger, ___ F. Supp. ___, Nos. 97-40012-01-RDR, 97-40012-02-RDR, 1997 WL 807925 (D. Kan. Dec. 17, 1997) (unpublished). Contact: AUSA Annette Gurney, AKS01(agurney).

Innocent Owner

■ **There is no innocent owner defense under 19 U.S.C. § 1497.**

A flight attendant failed to declare Ukranian artifacts worth over $20,000 upon entry into the United States. The U.S. Customs Service seized the artifacts under 19 U.S.C. § 1497 for forfeiture. The claimant declared that he was an innocent owner because he did not arrange for the shipment of the artifacts into the United States. The claimant had bought the artifacts in the United States and the seller was to be responsible for shipping the artifacts, in compliance with Customs regulations. The seller

arranged to have his former wife (the flight attendant) transport the artifacts.

The district court granted summary judgment for the United States. The court noted that, although the Supreme Court in *Calero-Toledo v. Pearson*, 416 U.S. 663 (1974), stated that it would be difficult to forfeit the property of a person who was unaware of the wrongdoing and also had done all that he could to prevent the wrongdoing, the Supreme Court clarified its position in *Bennis v. Michigan*, 516 U.S. 442 (1996), which held that there is no innocent owner defense if the statute does not provide for one, except, perhaps, where the goods were stolen from the owner. Therefore, because 19 U.S.C. § 1497 does not provide for an innocent owner defense, the district court concluded it could not hold for the claimant even if he was an innocent owner. Furthermore, the court added once the innocent owner defense has been rejected and the items properly forfeited, the claimant no longer has any standing to challenge the authority of the United States to dispose of the items as it sees fit. —*HSL*

United States v. Various Ukranian Artifacts, ___ F. Supp. ___, No. CV-96-3285 (ILG), 1997 WL 793093 (E.D.N.Y. Nov. 21, 1997). Contact: AUSA Vincent Lipari, WTGATE (vlipari).

Awards for Informants

- **A statutory reward in a forfeiture case brought under 21 U.S.C. § 881 is paid pursuant to the discretionary reward provisions of 21 U.S.C. § 886(a) and not pursuant to the mandatory reward provisions of the Customs statute, 19 U.S.C. § 1619. Suit does not lie under the Tucker Act to recover rewards under 21 U.S.C. § 886(a) because the Tucker Act allows suits only where the plaintiff has a right to a mandatory payment.**

Plaintiff sued the United States under the Tucker Act to recover an informant's reward which he alleged he had been promised for his assistance in a narcotics-based forfeiture case. The Government asserted that plaintiff's assistance had related only to the forfeiture of a single motorcycle.

The claims court opined that plaintiff based his suit upon 19 U.S.C. § 1619, part of the U.S. Customs Service's forfeiture statute, because awards under section 1619 are mandatory. Because suit lies under the Tucker Act only where payment by the United States is mandatory, the court concluded:

> "Because plaintiff has not alleged that he worked either with or through the U.S. Customs Service, he may not look to the customs laws for an award. Awards under the narcotics laws pursuant to 21 U.S.C. § 886(a) are discretionary, so plaintiff has not stated a claim upon which relief may be granted."

The claims court ruled that, although the Title 21 narcotics forfeiture statute incorporates the Customs forfeiture procedures of Title 19, it doesn't incorporate the reward provisions of section 1619. It cited the legislative history to show that section 1619 used to apply to narcotics forfeitures until 21 U.S.C. § 886(a) was enacted. Because suit lies under the Tucker Act only where the plaintiff has a definite right to be paid a specific sum, it granted defendant's motion to dismiss for failure to state a claim. —*BB*

Sarlund v. United States, ___ Cl. Ct. ___, No. 95738-C, 1998 WL 30648 (Cl. Ct. Jan. 27, 1998). Contact: Attorney Lisa B. Donis, Criminal Division, CIV02(ldonis).

Quick Notes

■ Delay

A district court held that a 38-month delay in filing a civil forfeiture action after the claimant's money was seized did not violate the claimant's due process rights. The court held that the Government was justifiably concerned that initiating the civil forfeiture action before criminal proceedings were concluded could have risked improper disclosure of its evidence in the course of civil discovery. Therefore, in light of the absence of any prejudice to the claimant or any effort on his part to force the Government to start the civil forfeiture proceeding sooner, the Government was justified in not filing the civil case until the criminal conviction was affirmed on appeal.

United States v. Funds in Amount of $37,760.00, No. 97-C-6241, 1998 WL 42465 (N.D. Ill. Jan. 28, 1998) (unpublished). Contact: AUSA Matthew Tanner, AILN02(mtanner).

■ Effect on Sentence

A jury's determination, in the forfeiture phase of a criminal trial, that the defendant was responsible for a given amount of drugs (and drug proceeds) does not bar the court from calculating the defendant's sentencing level based on a greater amount of drugs. In short, there is no requirement that the jury's forfeiture verdict and the court's factual finding in support of the sentence be consistent with each other.

United States v. Love, ___ F.3d ___, Nos. 95-5760 and 95-5825,1998 WL 15819 (4th Cir. Jan. 20, 1998). Contact: AUSA Jane H. Jackson, ANCE01(jjackson).

■ Parallel Proceedings / Motion for Return of Seized Property

Defendant in criminal case moved for the return of a vehicle that was seized as part of a parallel civil forfeiture case. Even though the vehicle was named in the criminal indictment, the court said, it lacked authority to release property seized in another case that was pending before another judge.

United States v. Ruedlinger, No. 97-40012-RDR, 1997 WL 808662 (D. Kan. Dec. 15, 1997) (unpublished). Contact: Richard L. Hathaway, AKS01(rhathawa).

■ Excessive Fines / Section 2255

Following his conviction on criminal charges, Defendant filed a section 2255 motion to vacate his sentence, asserting a number of legal grounds. Among his arguments, Defendant claimed that the $10,106 civil forfeiture judgment entered by the district court in a parallel civil forfeiture proceeding was excessive under the Eighth Amendment. The court declined, however, to consider the Eighth Amendment issue. "A § 2255 motion allows a prisoner to challenge a criminal sentence imposed by the court, not a fine imposed in a civil action." Thus, the section 2255 motion was not the appropriate vehicle for raising the Eighth Amendment challenge.

Northrup v. United States, Nos. 3:92-CR-32, 3:96-CIV-836, and 3:97-CV-712, 1998 WL 27120 (D. Conn. Jan. 14, 1998) (unpublished). Contact: AUSA Peter Jongbloed, ACT01(pjongbl).

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